

Summer 2017

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## ABC CLINIC REVIEW

The annual Assistance for Business Clinic (ABC) traveled to Miles City on May 18, 2017, with Miles Community College hosting this year's event. The Montana Department of Labor and Industry and the Miles City Area Chamber of Commerce sponsored the ABC Clinic this year. The purpose of ABC Clinics is to educate and assist new and established employers, accountants, bookkeepers, human resource professionals and lawyers on various topics related to the operation of their businesses.

Attendance at the ABC Clinic was robust; 32 participants attended, despite it taking place during Bucking Horse Sale week, historically a busy time for local businesses. Employers and their representatives attended from Miles City, Baker, Jordan, Forsyth, Ashland, and Glendive. Participants received information from five presenters, who represented Unemployment Insurance Contributions and Benefits, Montana State Fund/Workers' Compensation, Job Service Miles City, Employer Support for the Guard & Reserve, and the Department of Revenue Withholding and E-Services.

Mike Creeden and Brett Nielsen from Unemployment Insurance Contributions and Benefits provided a brief history of Unemployment Insurance along with information on how UI rates are determined, the laws and processes, filing reports, tips to reduce costs, E Services overview, the role of employer in the Benefit Determination UI Claim process and the review and appeal process.

Cindy Zimmerman from Workers' Compensation presentation included information on the history of Workers' Compensation along with information on Workers' Compensation two goals of providing medical care and income to workers injured on the job and death benefits to families or workers killed on the job and to protect employers from costly and unpredictable lawsuits.

Ron Nemec and Kim Blunt from Job Service Miles City provided information on the many services provided by the Montana Department of Labor and Job Service offices across the state. Services highlighted included assistance with job descriptions, the interview process and employment law. They also shared information on Federal Bonding, Workforce Opportunity Tax Credit, Work Base Learning, Customized Testing, Recruitment/Retention of employees, On the Job Training, Apprenticeship and Incumbent Worker Training.

Theresa Sroczyk from Wage and Hour presented information on the Wage Payment Act, Minimum Wage Laws, methods of payment, Overtime Laws, compensatory time, overtime calculations, child labor/youth employment, and Montana Prevailing Wage Law.

Dave Kelly from the Employer Support of the Guard and Reserve provided information on the Uniformed Services Employment and Reemployment Rights Act. He also explained how ESGR was established to promote cooperation and understanding between Reserve Component Service members and their civilian employers.

Stewart St. Clair from the Montana Department of Revenue Withholding and E-Services presented information to the employers on Montana wage withholding, compliance and collection efforts, new business registration with the Department of Revenue, W-4 Guidelines, different types of compensation, calculating employee withholding, and utilizing e-services.

The ABC Clinic not only provided businesses with the opportunity to learn from presentations, but employers and their representatives were also able to ask specific questions and connect with presenters for future reference.



## LOCAL AREA PROFILES

*Labor market information portal now provides deeper economic data for counties.*

The Montana Department of Labor & Industry is excited to announce the addition of local area profile data to the Labor Market Information website allowing job seekers and businesses the opportunity to understand their counties' economic status better.

Using dropdown menus this interactive data tool allows Montanans to get the most up-to-date labor market data for each of the state's fifty-six counties including:

***Top private employers; Employment by industry; Annual average wages;***

***Annual per capita income; Employed, unemployed and unemployment rate and;***

***Annual population by age.***

"As Montana's workforce continues to age into retirement, it is vital our next generation of workers have the online tools available to determine their career pathways," said Commissioner of Labor & Industry Pam Bucy. "For local businesses looking to grow and expand their operations, this new tool provides valuable insight into their county's labor market information. Beyond providing local area data, this new tool also reduces the costs of printing flyers that quickly become out-of-date."

Using this new tool is simple and are accessed under the Local Area Profiles tab and Select County under the "Select Coverage" heading. Under the "Select Area" heading click on the county name. State data continues to be available by clicking on "State" under the "Select Coverage" heading and then clicking on "Montana" under the "Select Area" heading.

This new tool replaces county flyer publications that can quickly become outdated due to printing timelines. The Research & Analysis Division is currently working to provide these same data options for the state's seven reservations in the future.

## YOU CAN LOOK, BUT DON'T TOUCH

### ***Reviewing Employees' Personal Emails***

It is no secret that employees regularly use e-mail at work for a wide array of reasons. Employers that believe they have a right to access an employee's personal e-mail simply because it was accessed by the employee at work are in for a rude awakening. Any employer considering reviewing an employee's personal e-mail must be aware of the Stored Communications Act (SCA).

#### **What is the SCA?**

Employers have a legitimate interest in monitoring workplace communications that involve their business. For example, a salesperson may have started a company that directly competes with their employer and is targeting the employer's current and potential customers. To protect themselves, employers are increasingly relying on handbooks that contain e-mail privacy policies that advise employees that they have no expectation of privacy in e-mails sent over employer-owned servers and using employer-owned computers. However, an interesting scenario arises when an employer does not provide the e-mail service. What if an employee uses a personal G-mail or Hotmail account to harm the employer or steal the employer's property?

The SCA makes it illegal to access, without authorization, a facility through which an electronic communication service is provided and to intentionally access an electronic communication while it is in electronic storage. In the employment context, the SCA makes it unlawful for an employer to review an employee's private e-mails without authorization. A person harmed by a violation of the SCA may file a private civil lawsuit against the perpetrator and recover compensatory damages, punitive damages, and reasonable attorney's fees.

#### **What have courts said?**

Only a handful of courts have interpreted the SCA, and the decisions have provided interesting

### YOU CAN LOOK, BUT DON'T TOUCH -Reviewing Employee's Personal Emails (Continued)

and somewhat inconsistent results. In a New York case, an employer reviewed a former employee's Hotmail e-mails without authorization after he was terminated. The employee filed suit under the SCA. The employer argued that reviewing the employee's e-mails did not violate the SCA because he had implicitly authorized the review by storing his username and password on the employer's computer system and forgetting to remove the account from an employer-provided phone before returning it. The court rejected that contention, finding it was equivalent to arguing that the employee implicitly authorized the employer to enter his home without his knowledge by leaving his house keys on the reception desk at the office.

In another case filed in Ohio, a terminated employee returned her company-issued BlackBerry® , mistakenly believing she had deleted her personal e-mail account. She later discovered that her former supervisor accessed and read more than 48,000 of her personal e-mails during an 18-month period following her termination. Not surprisingly, she was upset and sued her former supervisor and employer for violations of the SCA, among other things. The court dismissed the SCA claims involving e-mails the employee had opened and read prior to the employer reviewing them. The court reasoned that the term "electronic storage" is narrowly defined under the SCA and that previously opened e-mails do not meet the definition.

### Bottom Line

If you wish to review employee communications that occur at work or are made on employer-owned equipment (e.g., desktops, laptops, and cell phones), have a policy that specifically provides for the right to monitor and review all work-related communications made by employees on such devices. The SCA arguably does not apply to e-mails in a personal account that have already been viewed by an employee because those e-mails are not considered to be in "electronic storage." However, case law on the SCA is scarce, and other courts may interpret the SCA's requirements differently.

Given the uncertainty in this area, proceed with caution in reviewing employees' personal e-mails, even if you suspect wrongdoing. If you believe an employee is competing with your company or is engaging in other misconduct, consult with counsel at an early stage to determine the best method to stop the misconduct and gather necessary evidence.

*Lessner, Justin H. "You Can Look, But Don't Touch." Wisconsin Law Letter, March 02, 2017.*

## PERSONAL PHONES CAUSING A PROBLEM AT WORK? DAMAGE CONTROL IS POSSIBLE

Smartphones. Certainly, they can be tremendous tools, but they also can be major distractions in the workplace. A recent survey from CareerBuilder placed cellphones at the top of a list of productivity killers at work, more of a problem than office gossip, social media, smoke breaks, and other diversions.

Phones are now so much more than phones. They enable employees to make calls and texts, check social media and personal email, surf the internet, shoot photos and videos, play games, and more—all on company time. And that gives employers reason for concern.

The CareerBuilder survey, conducted in 2016, found that 83 percent of the U.S. workers in the survey had smartphones and 82 percent reported keeping their phones nearby while working. The survey also found that two-thirds of the workers admitted to checking their phones multiple times throughout the workday.

What are those employees/phone enthusiasts doing? The survey said 65 percent were spending time on personal messaging, 51 percent were checking the weather, 44 percent were catching up on news, 24 percent were shopping, and 3 percent admitted to using their phones during the workday for dating.



### Personal Phones Causing a Problem at Work? Damage Control is Possible (*Continued*)

Personal phones don't have to be a problem at work, but what happens when they do become productivity-killing distractions? How can employers hold down the damage?

#### Understand the problem

"The first advice that I would give any employer is to not overreact," Brad Federman, chief operating officer for F&H Solutions Group, a human resources consulting firm in Memphis, Tennessee, says.

Sometimes when employers begin noticing an employee or two on their phones, they assume that they have a problem with employees wasting time, Federman says. So he suggests a few steps for employers to take if they're concerned about their employees' phone use.

- Determine if there really is a problem.
- Make a distinction between employees who have their phones in view and even check them throughout the day versus employees who spend a lot of time on their phones. "If there are people playing games, internet surfing, texting, etc. that is different than ensuring they are not getting a message from a family member, etc.," Federman says.
- Have conversations and training on appropriate use of personal cellphones at work. "It's OK to put that into a policy," Federman says, "but I would ensure that the policy is written in an employee-friendly manner instead of one that comes across in a punitive manner."

Federman notes how the rise of personal phones has changed the way employees stay in touch with the people important to them during work time.

"Our phones truly have become an extension of ourselves," he says. "It used to be that when there was a personal emergency or an issue people would call our work phone, or they would call the main line in order to get our attention and make sure we are aware of personal things, such as a family member being ill, etc. Now people do not give out their work phone number as much as they do their cell phone number for personal reasons. In many ways this is actually better for work," since the employer's resources aren't tied up for employees' personal business.

#### Personal phone ban?

Even though personal phones can pay off for both the employee and employer, employers need to respond when phone use becomes a problem. It can be tempting to impose an outright ban on personal phones at work, but Federman says he doesn't advise that action.

"First (a ban) is very extreme and will cause a drop in morale," Federman says. "Second, it can create personal complications for people and create risks for employers that they do not want to have." He would ask employers contemplating a ban to imagine a school having trouble getting in touch with a parent or a family member at a hospital not being able to contact an employee because of a workplace no-phones policy.

"And the last reason I would not create a ban is because we are punishing a majority of people for the abuse by a few," Federman says.

#### What to do

So although it's important for employers to guard against overreacting, they do need to respond to abuse. Federman has a few suggestions:

"First, when you have a performance problem, deal with the person who has a performance problem," Federman says. If employees are abusing their rights by not putting in their time at work and wasting time on their phones, he says to address that individual and put them through a disciplinary process. "Second, manage by results, not by time. If I have an individual who can actually utilize their personal phone for personal reasons and still get more work done than everyone else, why do I care?" Federman says. "The reality is as organizations, we should care most about productivity and the quality of work our employees are producing. Manage towards those two issues and you will be fine."

*Binford, Tammy. "Personal Phones Causing a Problem at Work? Damage Control is Possible." HR Hero. May 19, 2017.*